NILI GUMBANG & ORS.

v.

PUBLIC PROSECUTOR

HIGH COURT, BRUNEI
POWER J
[CRIMINAL APPEAL NOS. 7, 8 & 9 OF 1985]
2 APRIL 1985

CRIMINAL LAW AND PROCEDURE: *Offence under s. 56 of Immigration Enactment 1956 [Brunei] - Whether strict liability offence - Sections 5A, 107 of Penal Code (Brunei) - Charge explained on the basis of strict liability offence - Whether valid - More than one sentence imposed under the Enactment.*

The appellants are appealing against conviction and sentence on a charge of abetting 2 illegal immigrants to enter the State contrary to s. 56 of the Immigration Enactment 1956. The prosecution informs the Court that they had proceeded in the lower Court upon the basis that s. 56 created a strict liability offence and it was likely that the Magistrate held the same view. The issue is therefore whether s. 56 creates a strict liability offence and whether the plea in the lower Court was valid.

Held:

[1] The word "abet" is defined in s. 107 of the Penal Code. It states that a person abets the doing of a thing who intentionally aids the doing of that thing. Section 5A of the Code applies that section to any written law. A person would therefore commit an offence under s. 56(b) of the Enactment only if he intentionally aided any person to enter the State in contravention of the Enactment. Proof of knowledge is an ingredient of the offence. Such a charge was not put and explained to the appellants and they must be allowed to reverse their pleas.

[2] The offenders against s. 56 are liable "to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping". It is clear by virtue of s. 38 of the Interpretation and General Clauses Enactment 1959 that it is open to the Court to impose either a prison sentence or a fine or whipping but that, if the Court does decide to impose a prison sentence, it must be for not less than 1 year.

[Appellants allowed to reverse their pleas. Matters remitted to Magistrate's Court for early trial.]

Legislation referred to:
Interpretation and General Clauses Enactment 1959 [Brunei], s. 38
Immigration Enactment 1956 [Brunei], s. 56(b), 56
Emergency Immigration Amendment Order 1984 [Brunei], s. 56(b)
Penal Code [Brunei], ss. 5A, 107

For the appellants - in person
For the state - Ivan Leong, DPP

JUDGMENT

Power J:

I am dealing here with 3 appeals in each of which the appellant is appealing against conviction and sentence on a charge of abetting 2 illegal immigrants to enter the State of Brunei contrary to the provisions of s. 56 of the Immigration Enactment 1956 as amended by the Emergency

Immigration Amendment Order 1984. Section 56(b), under which the appellants were charged, states that any person who "abets any person to enter or leave Brunei in contravention of the provisions of this Enactment or of the regulations" shall be guilty of an offence. This subsection of s. 56 was not affected by the Amendment Order. The subsection of s. 56 dealing with harbouring were, however, altered to delete the word "knowingly" therefrom.

It seems that the intention of the draughtsman may have been to make offences under s. 56 offences of strict liability. However that may be, s. 56(b), which did not contain the word "knowingly," was left unaltered. The prosecution informs that they have proceeded upon the basis that s. 56(b) does create an offence of strict liability and it was conceded that it was likely that the magistrate held the same view. This is important because one ground of appeal is that the appellants did not understand the nature of the charge and did not have it properly explained to them.

The appellants, in their affidavits, go further and say that, because of their dialects, they had difficulty understanding what was said to them. It seems to me, given the affidavits from the interpreter and the magistrate, saying that the appellants said that they understood Malay, that the charges were read and explained to them in Malay, and that they stated that they understood them, that I should not give any weight to this suggestion.

What concerns, however, is not **whether** the charge was explained to and understood by the appellants but **what** charge was explained to them. If the offence was put to them on the basis that it was an offence of strict liability and I am satisfied that I must, in fairness to the accused, proceed upon the basis that it was, and they pleaded to it upon that basis then, if it is not such an offence i.e. if knowledge forms an ingredient thereof, then I must hold that the plea of the appellants was not a valid plea to the charge.

The word "abet" is defined in s. 107, Chapter V, of the Penal Code. It states that a person abets the doing of a thing who intentionally aids the doing of that thing. Section 5A of the Code applies that section "to any written law now or hereunder in force and to any instrument made thereunder." A person would therefore commit an offence under s. 56(b) of the Immigration Enactment only if he intentionally aided any person to enter the state in contravention of the provisions of the Immigration Enactment. Proof of knowledge is, therefore, an ingredient of the offence and, as I am satisfied that I must proceed upon the basis that such a charge was not put and explained to the appellants, they must be allowed to reverse their pleas. The matters are remitted to the Magistrate's Court for an early trial.

I feel it proper to comment, before leaving the matter, on the new penalty section inserted by the Amendment Order 1984. This provides that offenders against s. 56 are liable "to imprisonment for a term of not less than one year and not more than seven years and a fine not exceeding twenty thousand dollars and whipping". It seems to me clear, by virtue of s. 38 of the Interpretation and General Clauses Enactment 1959, which states that "whenever, in or by virtue of any written law, more than one penalty is perscribed for an offence, the use of the word 'and' shall signify that the penalties may be inflicted alternatively or cumulatively ..." that it is open to the Court under the penalty section to impose either a prison sentence or a fine or whipping but that, if the Court does decide to impose a prison sentence, it must be for not less than 1 year.

Also found at [1985] 1 CLJ 402